

MARK D. DEHNCKE
Claimant

MARKS CARPETS
Respondent

CIGNA
Insurance Carrier

KANSAS WORKERS COMPENSATION FUND

ORDER

APPEARANCES

Claimant appeared by his attorney, James B. Zongker of Wichita, Kansas. Respondent and its insurance company appeared by their attorney, John Badke of Wichita, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The Appeals Board has reviewed and considered the record listed in the Award. The Appeals Board adopts the stipulations listed in the Award.

ISSUES

The sole issue to be considered on appeal is the nature and extent of claimant's disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments of the parties, the Appeals Board finds claimant suffered a fifty-eight and one-half percent (58.5%) permanent partial general disability as a result of accidental injury arising out of and in the course of his employment.

Claimant met with personal injury on September 15, 1993 when his vehicle was struck from the rear by an eighteen-wheeler, knocking his van into the ditch. He sustained injuries to his neck and lower back. Claimant had suffered injury to his back approximately ten (10) years earlier and in March of 1983 had Herrington rods placed in his back. After the 1983 injury, claimant worked in his current occupation as a carpet layer until the current injury. After the present injury claimant attempted to return to work and did work for approximately one (1) month. He testified that, as a result of his injuries, he was unable to continue in this line of work.

Two medical experts testified regarding claimant's functional impairment and work restrictions. Dr. Ernest Schlachter diagnosed a chronic lumbar strain for which he assessed a five percent (5%) permanent partial impairment of the function of the body as a whole. He recommended that claimant permanently avoid repetitive lifting of more than thirty-five (35) pounds on a frequent basis or forty-five (45) on a single-lift basis. He also recommended claimant avoid repetitive kneeling, bending and squatting. Of the carpet laying duties, he felt claimant could bend down and cut the carpet if others laid it out. Dr. Jacob Amrani rated claimant's impairment as a three percent (3%) impairment to the body as a whole. He recommended that claimant avoid lifting more than twenty-five (25) pounds frequently or fifty (50) pounds on an occasional basis. Dr. Amrani concluded that claimant would be able to go back to work in the carpet business as long as he stayed within the lifting restrictions. Dr. Amrani's restrictions did not include a prohibition against bending or twisting. Dr. Amrani agreed that claimant had advised him that bending and lifting caused pain. Dr. Amrani did not, however, restrict claimant from such activities because he distinguishes between activities which cause pain and activities which cause damage. It appears from his testimony that he limits his restrictions to those activities which might cause damage and leaves to the claimant's discretion whether to avoid activities which cause pain but not damage.

The Appeals Board concludes from the record that the restrictions by both Dr. Amrani and Dr. Schlachter would preclude claimant from returning to his full duties as a carpet layer. Claimant describes his activities as including stooping, bending, twisting and kneeling. He also testified to lifting up to one hundred and fifty (150) pounds. The claimant's work usually involved working in a kneeling position and bending over constantly.

The determination of claimant's permanent partial general disability is governed by the "New Act" provisions of K.S.A. 44-510e which became effective July 1, 1993. The "New Act" describes the test for general body disability as follows:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury."

Respondent and claimant both presented evidence relating to claimant's ability to perform the tasks he had performed in employment during the fifteen (15) year period preceding the accident. Claimant had engaged in carpet laying and related activities during that fifteen (15) year period. Claimant testified to the tasks he had performed. Jerry Hardin and Karen Terrill, vocational experts, also both testified and listed tasks claimant performed in his fifteen (15) years of work prior to the date of accident. Mr. Hardin testified then that using Dr. Amrani's restrictions, claimant would have an average task loss of seventy-two and one-half percent (72.5%). Using Dr. Schlachter's restrictions claimant would have a loss of ability to perform tasks of ninety-six percent (96%). Dr. Schlachter testified that he agreed with the assessment of Mr. Hardin.

Ms. Terrill broke the tasks down by percentage of time each task was performed. Each job was divided into tasks. The percentage of time in the job performing the task was then determined. The percentage of the fifteen (15) year work history on the job was calculated and then the percentage of his fifteen (15) year work history performing the task was calculated. Applying Dr. Amrani's restrictions to those time-weighted tasks, she concluded claimant suffered a seventeen percent (17%) loss of his task performing ability. Dr. Amrani agreed with Ms. Terrill's assessment.

The Appeals Board finds the time-weighted assessment made by Ms. Terrill more persuasive. The time weighting assigned each task a percentage of time performed over the fifteen (15) year history. The statute requires that we determine the extent expressed as a percentage to which the employee has lost the ability to perform work tasks. Several methods could, in theory, be used to make that determination. The statute does not expressly direct that we count the tasks and then calculate the percentage of those tasks that the claimant cannot perform. The statute does not expressly address how to consider a task which the claimant can still perform but cannot perform as well or as often or as quickly. The statute likewise does not expressly direct that we use a time-weighted analysis. Of the opinions presented here, however, the time-weighted assessment appears to more accurately assess claimant's loss of ability to perform tasks. In the absence of evidence relating to generally recognized and standardized definitions of what constitutes a task, the division of work duties into tasks becomes arbitrary. The percentage of tasks the individual can still perform then becomes equally arbitrary. Reference to the percentage of time worked at those tasks produces more uniform results.

Claimant argues that Ms. Terrill's opinion should not be relied upon because she has not utilized the restrictions recommended by Dr. Schlachter. In fact, the record contains no opinion of the impact of Dr. Schlachter's restrictions on a time-weighted task

loss. The record does contain opinions of Ms. Terrill from which such a calculation might be made. However, the Appeals Board finds that the less restrictive restrictions recommended by Dr. Amrani adequately reflect claimant's impairment and act as an appropriate basis for determination of the extent of disability.

Respondent also points out that in the 1993 amendments, K.S.A. 44-501(c) provides that, "The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability."

In this case both Dr. Amrani and Dr. Schlachter testified that they felt restrictions would have been appropriate prior to the injury in this case. The record also reflects, however, that the loss of ability to perform tasks reflected in Ms. Terrill's report and opinions measures a loss of ability to perform tasks claimant was actually performing prior to this injury. The Appeals Board therefore considers the opinion to be an appropriate basis for the Award and the Appeals Board finds the claimant has sustained a seventeen percent (17%) loss of ability to perform the tasks he was performing in the fifteen (15) years preceding the date of injury.

The wage loss component of work disability must also be determined. K.S.A. 44-510e. In this case the claimant was not working after the injury. He had attempted to return to carpet laying work but found he was unable. Respondent argues that the recent decision in Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995) requires that we limit claimant's loss to a loss of ability to earn wages. In this case the record contains the vocational expert opinion reflecting projections about what claimant would be able to earn. The amendment in 1993 eliminated use of ability and required reference to "what claimant is earning." In this case there is no evidence that claimant refused offered employment or voluntarily took himself out of the labor market. Accordingly, we find the Foulk decision does not apply to the facts of this case and find that claimant has suffered a one hundred percent (100%) loss on the wage component factor of work disability.

The wage component must be averaged together with the task loss percentage. Averaging the two (2) together in this case, the Appeals Board finds claimant has a fifty-eight and one-half percent (58.5%) work disability. In so finding the Appeals Board expressly disagrees with the conclusion of the Administrative Law Judge limiting the Award to functional impairment only.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Shannon S. Krysl, dated January 9, 1995, should be, and hereby is, modified as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Mark D. Dehncke and against the respondent, Marks Carpet, and its insurance carrier, CIGNA, for an accidental injury which occurred September 15, 1993 and based upon an average weekly wage of \$354.23, for 15 weeks of temporary total disability compensation at the rate of \$236.17 per week or

\$3,542.55, followed by 242.78 weeks at the rate of \$236.17 per week or \$57,337.35 for a 58.5% permanent partial general body disability, making a total award of \$60,879.90.

As of September 29, 1995, there is due and owing claimant 15 weeks of temporary total disability compensation at the rate of \$236.17 per week or \$3,542.55, followed by 91.29 weeks of permanent partial disability compensation at the rate of \$236.17 per week in the sum of \$21,559.96 for a total of \$25,102.51 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$35,777.39 is to be paid for 151.49 weeks at the rate of \$236.17 per week, until fully paid or further order of the Director.

IT IS SO ORDERED.

Dated this ____ day of November 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER**DISSENT**

I respectfully disagree with the majority's finding of loss of ability to perform work tasks. As K.S.A. 44-510e now provides, one of the prongs of the computation for work disability is the loss of ability to perform work tasks that the claimant performed during the fifteen (15) year period before the accident. Nothing in the statute suggests we are to either consider or attempt to measure the amount of time an employee has spent in those tasks. In some situations the percentage of lost tasks might approximate the percentage of time these lost tasks represent; in many instances they will significantly differ.

If the test were to determine the percentage of time one engaged in those lost tasks, a time-weighted analysis would be appropriate. However, since that is clearly not the test, the majority is inappropriately applying a standard and test other than the one provided by the legislature. The statutory language is clear that permanent partial general disability is determined by averaging the percentage of wage loss with the percentage of loss of "ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident" K.S.A. 44-510e(a). "When a statute is plain and unambiguous the court must give effect to the intention of the legislature as expressed, rather than determine what the law should or should not be." Martindale v. Tenny, 250 Kan. 621, 626, 829 P.2d 561 (1992) (quoting Randall v. Seemann, 228 Kan. 395, Syl. ¶ 1, 613 P.2d 1376 [1980]).

BOARD MEMBER

c: James B. Zongker, Wichita, KS
John Badke, Wichita, KS
Shannon S. Krysl, Administrative Law Judge

MARK D. DEHNCKE

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DOCKET NO. 189,455

Philip Harness, Director